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No. 97-1734

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STICHTING PENSIOENFONDS VOOR DE GEZONDHEID, GEESTELIJKE EN MAATSCHAPPELIJKE BELANGEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO BRIEF IN OPPOSITION

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The points made in opposition to the grant of certiorari in this case cannot be sustained.

I. *Morganbesser* Presents a Square and Irreconcilable Conflict.

The government erroneously asserts that the Second Circuit's contrary decision in *Morganbesser* v. *United States*, 984 F.2d 560 (1993), is distinguishable, "because that case involved a pension plan organized under United States law," and because tax-exempt treatment here would supposedly circumvent the "tax scheme that Congress specifically devised for pension plans in ERISA." Government Brief at 4, 8. There is no basis for this assertion of distinguishability. As noted in the Petition for a Writ of Certiorari ("Petition"), controlling and longstanding exemption authority specifically states that an entity's formation under foreign law is irrelevant to qualification for exemption, so long as the entity "meets the tests for exemption under that section." Petition at 24 (quoting Rev. Rul. 66-177, 1966-1 C.B. 132). Nor is any alleged inconsistency with ERISA relevant, since that statute specifically exempts plans like Petitioner from its substantive regulation.[1] If anything, Petitioner's specific exemption from ERISA regulation makes this a *stronger* case for exemption than *Morganbesser*.

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[1] ERISA § 4(b)(4), 29 U.S.C. § 1003(b)(4), specifically provides as follows:

> The provisions of this title shall not apply to any employee benefit plan if such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens.

Also irrelevant is the fact that those receiving pensions from Petitioner are generally not subject to U.S. income taxation. It is the exempt status of the pension trusts themselves, not their beneficiaries, at issue in both this and the *Morganbesser* case. Moreover, there is nothing intrinsically or intuitively amiss when U.S. citizens and nonresident alien beneficiaries are taxed differently on distributions from an exempt trust. Congress surely did not intend to subject Dutch citizens to U.S. tax on pension benefits earned and paid to them in Holland.[2]

II. The Lower Court Approach Precludes Effective Judicial Review.

The lower court decision does, in fact, put IRS litigating positions in this area beyond judicial review. The Government Brief sets forth the following purported rebuttal: "If the plain language of the statute or (when relevant) its legislative history unambiguously demonstrates that a taxpayer is entitled to an exemption, the government's litigating position would not be immune from review." *Id.* at 7. While undoubtedly true, this proposition has no relevance here, where all parties concede that the statutory language

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[2] The government also argues that a regulation finalized in 1995, which has no direct applicability here, in effect moots the conflict prospectively. Government Brief at 9. Even were this so (in proposed form, the regulation drew numerous comments questioning its legitimacy), the regulation, by its own terms, has prospective effect only. The continuing importance of the issue for prior years is illustrated by more than twenty pending cases in the Tax Court alone. *See* Petition at 6; *cf. Colony, Inc.* v. *Commissioner*, 357 U.S. 28, 32 (1958) (certiorari granted because the question "remains one of substantial importance in the administration of the income tax law for earlier taxable years"); *Watson v. Commissioner*, 345 U.S. 544, 548 (1953) (certiorari granted where legislation with prospective application resolved question at issue).

and legislative history unambiguously demonstrate little, if anything, regarding either the meaning of the term "labor organization," or the scope of the statutory exemption set forth. As noted in the Petition, the Revenue Rulings under section 501(c)(5) of the Internal Revenue Code ("Code") cover only a fraction of the entities generally considered to be exempt "labor organizations," omitting such obvious candidates as labor unions themselves, as well as labor union councils and federations like the AFL-CIO.

Thus, the statutory term "labor organization" is itself undefined, and largely unexplained, by the statute, regulations and legislative history. The sole remaining authority recognized by the lower court is the limited universe of Code section 501(c)(5) Revenue Rulings. In these circumstances, the "unambiguous entitlement" position of the lower court necessarily puts government Code section 501(c)(5) litigating positions beyond effective judicial review. The lower court's novel "unambiguous entitlement" approach should be rejected in favor of a straightforward construction of the category, *i.e.*, "labor organizations," to which Congress did unambiguously grant exemption.

III. *IBM* Is Directly In Point.

IBM Corp. v. *United States*, 343 F.2d 914 (Ct. Cl. 1965) is precisely in point. The government dismisses its applicability on the mistaken assertion that *IBM* "was based solely on the concern that 'direct competitors' should receive equal treatment." Government Brief at 10. This assertion was rejected in the *IBM* decision itself, where the court stated the following:

> It would weaken and dilute the standard of equality Congress put into [the grant of discretion under Code section 7805(b)] to add the gloss that, even though the [Internal

> Revenue] Service violated the statute, the taxpayer is without remedy unless he proves that he lost business or competitive position.

343 F.2d at 925. *IBM* applicability thus does not turn on Petitioner's having a competitive position *vis à vis* the British plans recognized as exempt by the IRS.

In reality, *IBM* provides a precise template for the facts of this case. For more than five years, the IRS treated the two British plans as tax exempt, while failing to act on Petitioner's pending application for recognition of exemption under Code section 501(c)(5). Petitioner has not attempted to rely on the determination letter of another taxpayer (*cf.* Government Brief at 10), but rather has actively and steadfastly pursued recognition of exempt status and equal treatment for itself. The denial of equal treatment represents an *IBM* violation of Code section 7805(b), and a violation of the spirit if not the letter of international treaty obligations.[3]

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[3] Contrary to the government's assertions regarding Petitioner's treaty argument (Government Brief at 11), the notion of improper discrimination has been an element of Petitioner's case since Petitioner filed its claim for a refund. The treaty argument is also fairly included in Paragraph 28 of the complaint in which Petitioner alleges as a basis for its claim the IRS failure to accord equal treatment to similarly situated taxpayers. Moreover, by letter dated September 14, 1995, the government waived any "variance" objection, stipulating it would not argue that Petitioner was precluded from making or that a court was precluded from hearing any argument set forth in the complaint on grounds of "'variance' or any other doctrine." Such a waiver of the "variance" defense is perfectly proper. *See United States v. Felt & Tarrant Mfg. Co.* 283 U.S. 269, 273 (1931); *see also Goulding v. United States*, 929 F.2d 329, 332 (7th Cir. 1991). Upon review in this Court, Petitioner is not limited to the precise arguments made below but may make any argument in support of a properly presented federal claim. *Lebron v. National R.R. Passenger Co.*, 513 U.S. 374, 379 (1995); *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992).

Based on the foregoing, and the points set forth in its Petition, Petitioner respectfully requests the grant of a writ of certiorari in this case.

Respectfully submitted,

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